UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

UNITED STATES POSTAL SERVICE

and **Cases 28–CA–175407**
28–CA–178951

NATIONAL ASSOCIATION OF LETTER CARRIERS, SUNSHINE BRANCH 504, affiliated with NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL—CIO

Meagan B. Dolleris, Esq.,
for the General Counsel.

Dallas G. Kingsbury, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case is before me based upon a joint motion and stipulation of record (Joint Motion) submitted on November 28, 2016. by the counsel for the General Counsel, the United States Postal Service (Respondent), and the Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL–CIO (Charging Party or Union). Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations the parties agree to waive a hearing and ask that this matter be decided on the stipulated facts and exhibits set forth in the Joint Motion. Based upon the Joint Motion, and considering the arguments of the parties, I make the following findings of fact and conclusions of law.[1]

I. Jurisdiction and Labor Organization

Respondent provides postal services for the United States and operates various facilities throughout the country, including postal facilities located in Albuquerque, New Mexico. The

[1] I granted the Joint Motion on November 29, 2016, and thereafter Respondent and the General Counsel filed briefs with their legal arguments.

National Association of Letter Carriers, AFL–CIO (National Union) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (the Act). The Charging Party, a local chapter of the national union, is also a labor organization within the meaning of Section 2(5) of the Act. The National Labor Relations Board (Board) has jurisdiction over Respondent by virtue of Section 1209 of the Postal Reorganization Act of 1970, 39 U.S.C. § 1209. Accordingly, I find that this dispute affects commerce and that the Board has jurisdiction pursuant to Section 10(c) of the Act.

II. Procedural History

On October 28, 2016, an order further consolidating cases, amended third consolidated complaint, and notice of hearing issued alleging that Respondent engaged in various conduct in violation of Sections 8(a)(1), (3), (4), and (5) of the Act.[2] (JX. 5) In its answer, Respondent denies committing any violations. (JX. 6)

On November 10, 2016, the parties entered into an informal settlement agreement disposing of the majority of the unfair labor practice allegations, which were then severed from the complaint. (JX. 7) On November 18, 2016, the Regional Director for Region 28, issued an order clarifying the remaining complaint allegations. (JX 8). Pursuant to the order, and the stipulation of the parties in the Joint Motion, the issues remaining to be resolved in this matter are whether Respondent: (a) by implementing a policy requiring union officials to work at Respondent's facilities while on paid union time—instead of performing this work at the union hall—made a mid-term modification to the parties' collective-bargaining agreement in violation of Section 8(d) of the Act; (b) violated Section 8(a)(5) of the Act by unilaterally implementing this new policy; and (c) violated Section 8(a)(1) of the Act by restating the new policy to employees. (JX. 1 p. 6; JX. 8)

III. Facts

Respondent has recognized the National Union as the exclusive collective-bargaining representative of its city letter carriers.[3] This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from January 10, 2013, through May 20, 2016 (the CBA). The National Union has designated the Charging Party as its designee for various purposes, including the filing and processing of grievances under the CBA. To assist with the application of the CBA across the country, Respondent and the National Union have jointly drafted a Joint Contract Administration Manual (JCAM). (JX. 2) The parties consider the explanations contained in the JCAM as dispositive regarding their understanding of the CBA's terms.[4]

[2] Citations to the Joint Exhibits are denoted by "JX."

[3] While the specific unit definition is set forth in article 1 of the contract, unit basically consists of city letter carriers. (JX. 1)

[4] Notwithstanding, the JCAM specifically states that it "neither adds to, nor modifies in any respect, the current Collective Bargaining Agreement." (JX. 2, Preface)

A. Respondent's Unilateral Change in 2004

Historically, Respondent had allowed union representatives to clock-in at the Albuquerque Highland Station and then proceed directly to the Union's offices to perform work on Union related matters. In January 2004, Respondent informed the Union's president David Pratt (Pratt) that, instead of going to the Union office, he needed to report to the office of Labor Relations Manager Joel Wadsworth after he clocked in, and that he and Wadsworth would work together to reduce the outstanding grievance backlog; this decision was made unilaterally by Respondent, and the Union did not agree with the arrangement. *United States Postal Service*, 350 NLRB 441, 478 (2007). The Board found that, by unilaterally requiring Pratt to report to Wadsworth's office and requiring him perform union business in Wadsworth's office, Respondent violated Section 8(a)(1) and (5) of the Act. Id. at 441 fn. 2, 478. Respondent was ordered to cease and desist from unilaterally changing the practice of allowing union officials to work on paid union time at the Union's offices. Id. at 446.

B. ***Oklahoma Arbitration***

Respondent had a similar arrangement with the National Union's local affiliate in Oklahoma City, Oklahoma, whereby the local union vice president would go directly to the union hall to perform representational functions, instead of clocking in at her assigned postal facility. The union official would account for her time by recording it on a form and faxing it to her duty station; her time would then be approved by a supervisor or manager. On December 12, 2012, the Postal Service unilaterally prohibited this practice. The Union filed a grievance which went to arbitration. On October 10, 2014, the arbitrator issued his decision finding that the Postal Service acted unilaterally when it rescinded the longstanding practice, thereby violating article 5 of the CBA which prohibits unilateral actions.[5]

C. The 2016 Change to the Practice in Albuquerque

On March 4, 2016, Respondent's Albuquerque Postmaster sent a letter to the Union stating, in pertinent part, that Respondent had provided the Union with an office at each local facility and wanted Union officials, while on paid union time, to conduct their work at Respondent's facilities instead of driving to, and working at, the Union hall. (JX. 12) The letter further stated that Respondent had been trying to arrange a labor-management meeting with the Union, which had been unresponsive, and asked the Union provide a response regarding the recommended change by March 11. The Union did not respond to the letter. On March 24, the Albuquerque Postmaster sent another letter to the Union stating that Respondent had not received a response to its previous correspondence and that, effective March 28, 2016, the Postal Service was implementing the change. (JX. 13) Union officials and stewards, while on paid union time, would be required to perform this work at Respondent's facility instead of at the Union hall. Respondent made this change without the Union's consent.

[5] Article 5 of the CBA, reads as follows: "Prohibition of Unilateral Action: The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."

The next month, on June 8, Respondent orally restated the new policy. About 2 weeks later, on June 23, Respondent gave Pratt a routing slip again confirming the newly implemented policy. (JX. 14)

IV. Position of the Parties

The General Counsel asserts that the change Respondent proposed on March 4 constituted a mid-term modification. Therefore, the Union was under no obligation to respond to the Postal Service's request to bargain over the issue. Accordingly, the Government asserts that Respondent's implementation of the change constituted an improper contract modification in violation of Section 8(d) of the Act.

The Postal Service argues that Section 8(d)'s prohibition on making a mid-term contract modification does not apply, as there is no contractual provision covering the issue. Instead, it argues the proper analysis is that of a general obligation to bargain in good faith to impasse over a mandatory subject of bargaining. As such, Respondent argues there is no violation here because the Union waived its right to bargain, by refusing to respond to, or bargain with, Respondent after receiving notice of the proposed change.

V. Analysis

A "unilateral change" case and a "contract modification" case are fundamentally different. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). In a "'contract modification' case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract." Id. Where the General Counsel asserts an unlawful contract modification within the meaning of Section 8(d), "the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party." Id. The Board will not find a violation if "an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by animus or . . . acting in bad faith.'" *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965) (when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not determine which interpretation is correct)).

In a 'unilateral change' case, the General Counsel is not required to show the existence of a contract provision; "he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining.* The allegation is a *failure to bargain." Bath Iron Works Corp.*, 345 NLRB at 501 (italics in original). Thus, "[i]f the employment conditions the employer seeks to change are not 'contained in' the contract, . . . the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change." *St. Vincent Hospital*, 320 NLRB 42, 42 (1995). "In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain." *Bath Iron Works Corp.*, 345

NLRB at 501. Regarding remedies, the remedy for a unilateral change is to bargain. The remedy for a contract modification is to honor the contract. Id.

Here, there is no specific contract provision discussing whether union officials can work at the union hall while working on paid union time. Notwithstanding, the General Counsel argues that Respondent's conduct constitutes an unlawful mid-term modification, relying on the October 2014 Oklahoma arbitration decision. (JX. 15) Citing *E.I Du Pont & Co.*, 293 NLRB 896, 896 (1988), the General Counsel asserts that "if an arbitrator determines that a behavior is a past practice, that past practice becomes part of the collective-bargaining agreement." (GC Br. at 6) The problem for the Government is that neither *E.I Du Pont*, nor the arbitration decision, supports this proposition.

E.I. Du Pont does not involve a mid-term modification, but instead decides the arbitrability of alleged unilateral changes to work assignments. In *E.I. Du Pont*, the Board agreed with the trial judge that the complaint allegations should be deferred to arbitration, finding that the contract contained a broad grievance-arbitration clause. Id., at 896. Although the contract did not specifically address the company's authority to make or alter work assignments unilaterally, the contract did "mention work assignments several times in other contexts," and the parties had previously agreed to arbitrate a work assignment-issue, thereby evidencing their agreement that work assignment issues were subject to the grievance and arbitration process. Id. at 897. The Board noted that "arbitrators frequently find that customs and past practices may become part of the 'law of the shop' and thus enforceable through arbitration, even if they are not part of the written contract, and the Supreme Court has recognized arbitrators' authority to do so."[6] Id. (citing *Steelworkers v Gulf Navigation*, 363 U S 574, 581-582 (1960) (labor arbitrators source of law is not confined to the express provisions of the contract, but includes the "practices of the industry and the shop.")).

Thus *E.I. Du Pont* stands for the proposition that a dispute is subject to deferral where the underlying contract "arguably covers the dispute at issue," even absent specific contract language on the subject. Id. at 897. The case *does not* stand for the proposition argued by the government that "if an arbitrator determines that a behavior is a past practice, that past practice becomes part of the collective-bargaining agreement." (GC Br. at 6.)

As for the arbitration decision itself, it does not support a finding that a mid-term modification occurred. In the arbitration, a local union vice president in Oklahoma had an established practice of going to the union hall to process grievances while being paid by the Postal Service. On December 12, 2012, without bargaining with the union, the Postal Service put a stop to that practice. (JX. 15) The arbitrator found that Postal Service "acted unilaterally when it rescinded this practice," which violated the section of the parties' contract, prohibiting unilateral actions. Id. As a remedy, the arbitrator ordered the Postal Service to "cease and desist from altering that practice in any way unless and until it provides notice of its intention to do so to the union and engages in good faith bargaining with the union over the decision and any

[6] The Board also noted that "the Supreme Court has held that arbitration should be ordered 'unless it may be said with positive assurances that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Id. at 897 (quoting *Steelworkers v. Gulf Navigation*, 363 U.S. at 582–583).

impact the decision may have on members of the bargaining unit." Id. Thus, the arbitrator viewed the matter as a case involving a "unilateral change," not a mid-term modification, and ordered an appropriate remedy: "to bargain." *Bath Iron Works Corp.*, 345 NLRB at 501.

The General Counsel also points to *United States Postal Service*, 350 NLRB 441 (2007), to support its position. (GC Br., at 9–10.) However, that case, just like the Oklahoma arbitration, involved a "unilateral change." The Board found that the Postal Service violated Section 8(a)(1) and (5) by unilaterally prohibiting the union president from performing his duties at the union's offices. Id. at 441 fn. 2, 478. As a remedy, the Board ordered the employer to cease and desist from "unilaterally changing the practice of allowing" the Union president "to work on paid union time at the Local's office." Id.,at 446. Because *United States Postal Service* did not involve a mid-term modification, the Government's reliance on it is misplaced.

Similarly misplaced is the General Counsel's reliance on *Comau, Inc.*, 364 NLRB No. 48 (2016), to argue that the Board "may examine *past practice* in assessing whether the Policy Change violated Section 8(d) of the Act."[7] (GC Br., at 10.) In *Comau*, the employer operated three different facilities. Employees at one facility were covered by a collective-bargaining agreement that contained a set of "shop rules," primarily covering leave and attendance. When the employer closed this shop and transferred employees to the other facilities, it unilaterally implemented new shop rules, arguing that the original shop rules delineated in the contract were "plant-specific and did not apply outside of that facility." Id. slip op. at 2. The Board found a mid-term modification noting the uncontested evidence showed that, before the closing, unit employees were subject to the contract's shop rules even when they worked at other facilities, and the employer knew about this practice. Id. slip op. at 4–5.

Thus, in *Comau*, the General Counsel was able to show a specific contract provision, the shop rules, that the employer modified, without the consent of the Union. Here, the General Counsel has failed to show that any specific contract provision has been modified. As such, there is no mid-term modification. *Bath Iron Works Corp.*, 345 NLRB at 501.

Instead, the facts as stipulated by the parties present a "unilateral change" case. The practice of allowing union officers to work from the union hall while on paid union time was a longstanding practice that could not be changed unilaterally. *Postal Service*, 350 NLRB at 478. The employer was obligated to "bargaining in good faith to impasse over the subject before instituting the proposed change." *St. Vincent Hospital*, 320 NLRB at 42. While Respondent

[7] While the Board and the courts can find a mid-term modification involving *implied* contract terms based upon past practice, it appears that such a finding generally occurs when the implied terms are used to further define an already established contract provision. See, e.g., *Bonnell/Tredegar Industries, Inc.,* 313 NLRB 789, 790–792 (1994), enfd. 46 F.3d 339 (4th Cir. 1995) (18 year past practice involving specific formula used for calculating Christmas bonus became an implied term of the parties collective-bargaining agreement, where the bonus was mandated by the agreement, but failed to specify a formula for its calculation); *Communication Workers of America*, 280 NLRB 78, 79, 82 (1986) (Where collective-bargaining agreement required parties to share arbitration proceeding costs, Union violated Sec. 8(d) by refusing to share in the cost of transcripts requested by employer, and not agreeing to have official transcripts prepared, where there was an over 30-year practice of preparing, using, and cost-sharing official transcript of nonexpedited arbitration hearings). Here, the General Counsel points to no previously established contract provision to be further defined by the parties' past practice.

notified the Union of its desired change, and tried to bargain, the Union never responded. Thus, the question becomes whether the Union, by its actions, waived its right to bargain. *Bath Iron Works Corp.*, 345 NLRB at 501.

After a union receives notice of a proposed change in term and conditions of employment, it is "obligated to act with due diligence to request bargaining." *Talbert Manufacturing, Inc.*, 264 NLRB 1051, 1055 (1982). Here, the Union was notified on March 4, 2016, that Respondent wanted the change the practice of having union officials conduct union business at the union hall, and instead wanted them to perform this work at the office, and that Respondent had been attempting to schedule labor-management meetings with the Union. (JX. 12) Respondent asked for the Union to respond by March 11. (JX. 12) Twelve days later, after the Union refused to reply, the Postal Service implemented the change, and required all union officials and stewards "to conduct their union time at the office they are assigned to." (JX. 13)

Under these circumstances, I find that the Union had sufficient notice of the change, but failed to request bargaining, and having failed to do so, waived its right to complain about Respondent's failure to bargain. *Talbert Manufacturing*, 264 NLRB at 1055 (4-day notice of a proposed change to the union is sufficient time for the union to request bargaining and having failed to do so the Union waived its rights); *Double S Mining, Inc.*, 309 NLRB 1058, 1058, 1061 (1992) (union's refusal to bargain about amount of Christmas bonus, based upon mistaken belief that the bonus amount was already mandated by law, privileged company's implementation of its bonus proposal). As such, Respondent's actions did not violate Section 8(a)(5) of the Act. Finally, because the Postal Service did not violated either Section 8(d) or Section 8(a)(5) of the Act, there was no 8(a)(1) violation when it restated the policy requiring union officials to work at Respondent's facilities when on paid union time.

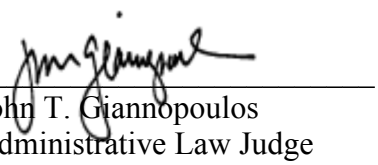
Conclusions of Law

The General Counsel failed to prove that Respondent violated the Act as alleged in the Complaint. On these findings of fact, conclusions of law, and based upon the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 22, 2017



John T. Giannopoulos
Administrative Law Judge

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.